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Summary record of the 873rd meeting

Held at Headquarters, New York, on Friday, 20 June 2008, at 10 a.m.

Chairman: Mr. Illescas (Spain)

Contents

Finalization and approval of a draft convention on contracts for the international carriage of goods wholly or partly by sea (*continued*)

* No summary record was prepared for the rest of the meeting.

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08-39368 (E)



The meeting was called to order at 10.10 a.m.

Finalization and approval of a draft convention on contracts for the international carriage of goods wholly or partly by sea (*continued*) (A/CN.9/642, A/CN.9/645 and A/CN.9/658 and Add.1 to 13)

1. **The Chairperson**, in response to queries at the previous meeting regarding the Commission's working methods, drew attention to paragraph 11 of document A/CN.9/653, "UNCITRAL rules of procedure and methods of work", elaborating on the concept of consensus in the work of the Commission. Paragraph 11 (c), described the Chairperson's role in determining the existence of consensus and allowed for a vote to be taken if a delegation formally disagreed with that assessment. Although that rarely happened in current practice, members did have the right to object.

Draft article 50 (Goods remaining undelivered)

2. **Mr. Mollmann** (Observer for Denmark) said that draft articles 49 and 50 were closely related. Draft article 49 aimed at making it possible to deliver goods without a transport document, while draft article 50 gave instructions to a carrier on the disposition of goods if they could not be delivered. He saw the articles as alternative possibilities that did not have to be applied in sequence. A carrier could follow the procedures outlined in draft article 50 before using the procedures in draft article 49, or could use them simultaneously.

3. **Mr. Rapatzikos** (Greece), drawing attention to his delegation's written comments (A/CN.9/658/Add.10, para. 13), said that his delegation shared the Danish interpretation of draft article 50 but thought that the text required further clarification.

4. **Mr. Imorou** (Benin), supported by **Mr. Elsayed** (Egypt), **Mr. Egbadon** (Nigeria), **Mr. Ngoy Kasongo** (Observer for the Democratic Republic of the Congo), **Ms. Traoré** (Observer for Burkina Faso), **Mr. Mouloupo** (Observer for the Congo), **Mr. Bigot** (Observer for Côte d'Ivoire) and **Mr. Luvambano** (Observer for Angola) said that in many States under national law a carrier could not destroy undelivered goods but must turn them over to the customs authorities. Destruction of goods was a serious step. Therefore paragraph 2 (b) should contain the same phrase, "pursuant to the law or regulations of the place where the goods are located at the time", that appeared

in paragraph 2 (c) regarding the sale of undelivered goods.

5. **Ms. Slettemoen** (Norway) said that her delegation agreed that the carrier should be able to apply the provisions of draft article 50 without being required to apply draft article 49, but that interpretation was not clear from the text as it stood. That understanding should be reflected in the Commission's report and should be made clear in the text as well.

6. **Mr. Mayer** (Switzerland) said that he had no firm view on the position of the observer for Denmark but did not see how it could be reconciled with the text of draft article 50. The use of "only if" in the chapeau of paragraph 1 implied that the list of events covered in subparagraphs (a) to (e) was exhaustive, and subparagraph (b) implied that the carrier would first have to follow the procedures in draft article 47, 48 or 49. With regard to paragraph 2 (b), his delegation favoured retaining the current text.

7. **Mr. Ibrahima Khalil Diallo** (Senegal) said that, as the destruction of cargo was a serious matter, his delegation supported the amendment proposed by Benin. In other respects, the text of draft article 50 was sufficiently explicit.

8. **Mr. Sharma** (India) said that he shared the understanding of the representative of Switzerland as to the reading of draft article 50. The procedure in draft article 50 for dealing with goods deemed undelivered could only be commenced after the procedure in draft article 49 had been exhausted.

9. **Mr. Mollmann** (Observer for Denmark) said that the proposal of the representative of Benin was useful; his delegation shared the understanding that any destruction of cargo under paragraph 2 (b) must be in accordance with local laws and regulations. In response to the representative of Switzerland, he pointed out that draft article 50, paragraph 1, described five different situations in which goods could be deemed undeliverable, with the fifth situation being simply that the goods were otherwise undeliverable by the carrier. That the five situations were alternative rather than cumulative was clearly shown by the "or" at the end of paragraph 1 (d). Having that reading of the article reflected in the report, however, would avoid any possible misunderstandings.

10. **Mr. van der Ziel** (Observer for the Netherlands) said that at times destruction of the goods might be the

only alternative, for example, where the goods were seriously damaged or perishable, but it should be a last resort. The proposal of Benin would be a useful addition to the text. He agreed with the Danish interpretation regarding the relationship between draft articles 49 and 50; there was no need to change the text in that regard, and the request to include a clarification of those provisions in the report of the Commission should be honoured.

11. Pending the outcome of informal consultations on draft article 49, as a consequential change the term "holder" might need to be added to draft article 50, paragraph 1 (b).

12. **Mr. Alba Fernández** (Spain) said that he endorsed the Danish interpretation regarding the relationship between draft articles 49 and 50, and indeed draft articles 47 and 48 as well. The carrier, to safeguard its position, should be able to commence the procedures permitted under draft article 50 without first having to resort to the procedures under draft articles 47, 48 or 49. The current wording of draft article 50 was sufficiently clear, but confusion could perhaps be avoided by deleting paragraph 1 (b), which was not strictly necessary, since the situation was covered by paragraph 1 (a).

13. **Mr. Sato** (Japan) said that the proposal by the representative of Benin should be carefully drafted to clarify the procedure. If there was a law or regulation concerning destruction in the place where the goods were located, the carrier should, of course, follow it; however, if the amendment could be taken to mean that the carrier always needed permission from an authority, it would place an undue restriction on its action. There might be an urgent need to destroy goods for safety reasons and no established procedure to follow.

14. **Mr. Shautson** (Belarus) proposed that the phrase "pursuant to the law or regulations of the place where the goods are located at the time" should be placed in the chapeau of paragraph 2 so that it would apply to all the subparagraphs. Further, he proposed adding the phrase "for reasons that do not depend on the carrier" at the end of paragraph 1 (e) in view of the serious consequences when goods were deemed undeliverable.

15. **Mr. Miller** (United States of America) said that his delegation generally supported the retention of draft article 50 in its current wording. The conditions listed in paragraphs 1 (a) to (e) were alternative, not cumulative. If drafted properly, the solution suggested

by the representative of Benin might be helpful. If there were applicable rules in the port where the goods were located, the carrier should comply with them. He shared the concerns expressed by the delegation of Japan regarding undue restrictions of the right to destroy the goods in cases where the carrier was left with undeliverable goods and no guidance.

16. **Mr. Berlingieri** (Italy) said that his delegation also supported the proposal made by the representative of Benin and suggested that mention of destruction of the goods should be moved to subparagraph 2 (c). Whether the same precautions for sale of the goods should also apply to destruction of the goods was a matter of drafting.

17. **Ms. Wakarima Karigithu** (Kenya) said that her delegation endorsed the proposal made by the representative of Benin. The language of paragraph 2 (c), if applied to the destruction of goods in paragraph 2 (b), should address the problem adequately.

18. **Mr. Delebecque** (France) agreed that destruction of goods was a serious act and should be carried out pursuant to local laws. He endorsed the suggestion made by the representative of Italy to mention destruction of goods in paragraph 2 (c), or perhaps in a new paragraph 2 (d).

19. **Mr. Mayer** (Switzerland), citing article 49, subparagraph (f), which stated that the carrier might refuse to follow instructions if the person failed to provide adequate security, pointed out that the implication was that the carrier was required to follow instructions under all other circumstances. It followed that the carrier would be obliged to attempt to obtain instructions from the controlling party or the shipper before initiating the procedure described in article 50. Therefore, the reading of those two articles by the observer for Denmark was irreconcilable with the text as currently drafted.

20. **Mr. Ndzibe** (Gabon) pointed out that a ship arriving at a port of destination was required to report to customs and that, in so doing, it automatically became subject to the local laws and regulations. His delegation could support the proposal by the representative of Benin provided that paragraphs 2 (b) and (c) reflected that situation.

21. **Ms. Slettemoen** (Norway) proposed the addition of the phrase "without regard to the provisions of

articles 47, 48 and 49 but" after the word "article" in the first line of paragraph 3, in order to clarify the point made by the observer for Denmark.

22. **Mr. Elsayed** (Egypt) said that the actions in respect of the goods listed in paragraph 2 (b) should be subject to the condition mentioned in paragraph 2 (c), namely, that such actions must be carried out in accordance with the practices or pursuant to the law or regulations of the place where the goods were located. The entire paragraph should be redrafted to reflect that change. In that sense his delegation endorsed the proposal made by the representative of Benin.

23. **The Chairperson** took it that the Commission accepted the amendment proposed by the delegation of Benin, borrowing the language in paragraph 2 (c) for the provision on the destruction of goods. The Commission's report would reflect the discussion on the interpretation of draft article 50, paragraphs 1 (a) to (e) in relation to draft articles 47, 48 and 49.

24. *Draft article 50, as amended, was approved in substance and referred to the drafting group.*

Article 51 (Retention of goods)

25. *Draft article 51 was approved in substance and referred to the drafting group.*

Draft article 1, paragraph 9 (definition of "documentary shipper")

26. *Draft article 1, paragraph 9, was approved in substance and referred to the drafting group.*

Draft article 52 (Exercise and extent of right of control)

27. **Mr. Imorou** (Benin) said that several aspects of article 52 were unclear. He wondered how the controlling party might modify instructions in respect of the goods, replace the consignee or obtain delivery of the goods at a port of call without changing the contract of carriage.

28. **Mr. Elsayed** (Egypt) said that the chapeau of paragraph 1 should be amended to state that the right of control might be exercised by the controlling party so long as it did not change the contract of carriage.

29. **Ms. Czerwenka** (Germany) said that her delegation supported the retention of article 52 as drafted. In certain situations, it was important for the controlling party to give instructions, despite the

potential change to the contract of carriage. Furthermore, although replacing the consignee might create problems, relevant precautions were covered by other provisions of chapter 10 on rights of the controlling party.

30. **Mr. Miller** (United States of America), **Mr. Kim In Hyeon** (Republic of Korea) and **Mr. Shautsou** (Belarus), endorsed the statement by the representative of Germany.

31. **Mr. Ngoy Kasongo** (Observer for the Democratic Republic of the Congo) said that he understood the concerns expressed by the representatives of Benin and Germany. He called for prudence in determining the specific conditions under which the controlling party might replace the consignee and noted that explicit mention of them would add to the clarity of the article.

32. **Mr. Sato** (Japan) said that his delegation supported the retention of the current text and noted that, in certain situations, it was indeed possible to modify instructions without changing the contract of carriage. Inclusion of specific conditions in the current article might create confusion, since other provisions of the same chapter addressed those conditions.

33. **The Chairperson** took it that a majority of the Commission members favoured retention of the current text of draft article 52.

34. *Draft article 52 was approved in substance and referred to the drafting group.*

Draft article 53 (Identity of the controlling party and transfer of the right of control)

35. **Mr. van der Ziel** (Observer for the Netherlands) said that his delegation had proposed a consequential change to draft article 53 in its written comments (A/CN.9/658/Add.9, para. 23). The chapeau of paragraph 1 should begin with the words "Except in the cases referred to in paragraphs 2, 3 and 4".

36. **Mr. Sato** (Japan), **Mr. Berlingieri** (Italy) and **Mr. Sharma** (India) endorsed the correction made by the observer for the Netherlands.

37. **Mr. Hu Zhengliang** (China), supported by **Mr. Miller** (United States of America), pointed out that the reference in paragraph 3 (c) should be to "article 1, subparagraph 10 (a) (i)".

38. **The Chairperson** took it that the Commission approved the technical corrections suggested.

39. *Draft article 53, as amended, was approved in substance and referred to the drafting group.*

Draft article 54 (Carrier's execution of instructions), draft article 55 (Deemed delivery), Draft article 56 (Variations to the contract of carriage), Draft article 57 (Providing additional information instructions or documents to carrier)

40. *Draft articles 54 to 57 were approved in substance and referred to the drafting group.*

Draft article 58. Variation by agreement

41. **Mr. Sato** (Japan) asked whether, since a paragraph 2 had recently been added to draft article 53, the reference to article 53, paragraph 1 (b), in draft article 58 should be expanded to take that into account.

The meeting was suspended at 11.40 a.m. and resumed at 12.15 p.m.

42. **Mr. van der Ziel** (Observer for the Netherlands) said that after consultations it had been concluded that there was no need to change the reference to draft article 53 in draft article 58.

43. *Draft article 58 was approved in substance and referred to the drafting group.*

Draft article 1, paragraph 12 (definition of "right of control") and paragraph 13 (definition of "controlling party")

44. *Draft article 1, paragraphs 12 and 13, were approved in substance and referred to the drafting group.*

45. **The Chairperson** invited representatives of the informal groups set up to review draft article 12, draft article 13 and draft article 38 to report on the outcome of their consultations.

Draft article 12 (Period of responsibility of the carrier) (continued)

46. **Mr. Sato** (Japan) reported that, despite lengthy consultations, no consensus had been achieved on a possible improvement to paragraph 3 of draft article 12. He assumed, therefore, that the text would remain unchanged.

47. **Mr. Alba Fernández** (Spain) said that, in its current wording, the draft article impaired the internal

consistency of the draft convention. Problems could result from a possible discrepancy between the provisions of paragraphs 1 and 3. Situations could arise in which the right of control, which coincided with the carrier's period of responsibility, commenced subsequent to the issuance of the transport document. While noting that his delegation's proposal to include in paragraph 3 the phrase "subject to the provisions of paragraph 1" had not been accepted, he again proposed that the phrase "For the purposes of determining the carrier's period of responsibility" should be deleted from the chapeau of paragraph 3.

48. **Ms. Czerwenka** (Germany) agreed that paragraph 3 presented a problem of interpretation which would be averted by the proposed deletion. The suggested addition of a reference to paragraph 1 would also be useful and had found some support in informal consultations.

49. **Ms. Carlson** (United States of America) and **Mr. Sharma** (India) said that, since no consensus had been reached on the draft article in informal consultations, the existing text should be retained.

50. **Mr. Lebedev** (Russian Federation) wished to know whether the proposed deletion in paragraph 3 had been discussed in informal consultations.

51. **Mr. Sato** (Japan) said that the deletion had been discussed but the concern raised by the representative of Spain in respect of the commencement of the right of control, especially in cases where the transport document had been issued earlier, had not been discussed in informal consultations.

52. *Draft article 12 was approved in substance and referred to the drafting group.*

Draft article 13 (Transport beyond the scope of the contract of carriage) (continued)

53. **Mr. Berlingieri** (Italy), reporting on informal consultations, said that he had hoped that a clearer wording would be found for draft article 13 and that the need to delete it would thereby be averted. However, despite all the efforts made to specify the subject matter and effects of the single transport document contemplated in the article, that had not proved possible. There seemed therefore to be no choice but to delete draft article 13.

54. **Mr. Sato** (Japan), while concurring in the deletion, said that it had been agreed that deletion

should not be taken to imply any criticism of the current practice in the trade of issuing a single transport document.

55. *Draft article 13 was deleted.*

Draft article 38 (Contract particulars) (continued)

56. **Mr. Sato** (Japan) reported that every effort had been made in informal consultations to incorporate into the list of contract particulars contained in paragraph 1 the largest possible number of the additional items proposed, together with any necessary qualification so as to avoid potential problems in practice. It had not been deemed wise to include the sensitive issue of approximate date of delivery, because of its close relation to the carrier's liability for delay, covered by draft articles 22, 23 and 24. He proposed the following new paragraph 2, *bis*:

"2 *bis*. The contract particulars in the transport document or the electronic transport record referred to in article 37 shall furthermore include:

"(a) The name and address of the consignee if named by the shipper;

"(b) The name of a ship if specified in the contract of carriage;

"(c) The place of receipt and, if known to the carrier, the place of delivery;

"(d) The port of loading and the port of discharge if specified in the contract of carriage."

57. **Mr. Ibrahima Khalil Diallo** (Senegal), **Mr. Elsayed** (Egypt), **Mr. Imorou** (Benin), **Ms. Wakarima Karigithu** (Kenya), **Mr. Sharma** (India) **Mr. Ngoy Kasongo** (Observer for the Democratic Republic of the Congo) and **Mr. Moulupo** (Observer for the Congo), expressed support for the proposal.

58. *Draft article 38, as amended, was approved in substance and referred to the drafting group.*

The meeting rose at 1 p.m.